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IN THE
COURT OF APPEALS OF INDIANA

OSWALDO MENDOZA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 87A01-0802-CR-74
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Keith A. Meier, Judge
Cause No.87D01-0410-FC-136

October 2, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Oswaldo Mendoza[1] appeals his sentence for dealing in marijuana in an amount greater than ten pounds, a Class C felony. On appeal, Mendoza raises one issue, which we restate as whether Mendoza's presumptive sentence of four years is inappropriate in light of the nature of the offense and Mendoza's character. Concluding Mendoza's sentence is not inappropriate, we affirm.

Facts and Procedural History[2]

The facts of this case are somewhat limited because Mendoza has not included the transcript of his guilty plea hearing as part of the record on appeal. Nevertheless, the record indicates that on October 12, 2004, the State charged Mendoza with dealing in marijuana in an amount greater than ten pounds, a Class C felony; possession of marijuana in an amount greater than thirty grams, a Class D felony; and possession of marijuana with a prior conviction for an offense involving marijuana, a Class D felony. In April or May 2005, the parties entered into a plea agreement under which Mendoza agreed to plead guilty to dealing in marijuana in an amount greater than ten pounds, and the State agreed to dismiss the remaining charges. As a condition of the plea agreement,

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[1] According to the presentence investigation report, Mendoza's true name is Sergio Maynez-Veloz.

[2] Mendoza included in his appendix a copy of the presentence investigation report on white paper. Indiana Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Indiana Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." Mendoza's inclusion of the presentence investigation report printed on white paper in his appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> > (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."

We remind Mendoza's counsel that he should follow these rules in future filings with this court.

Mendoza agreed to work as a confidential informant for the Warrick County Sheriff's Department. On May 6, 2005, the trial court accepted Mendoza's guilty plea, entered a judgment of conviction on that charge, and scheduled a sentencing hearing for August 1, 2005. Mendoza fled to Texas at some point before the sentencing hearing because, according to Mendoza's attorney, his work as a confidential informant resulted in his family receiving threats to their health and safety.

At some point in 2007, Mendoza was arrested in Texas on an unrelated matter and extradited to Indiana. On October 15, 2007, Mendoza filed a motion to withdraw his guilty plea, but later withdrew that motion. On January 14, 2008, the trial court conducted a sentencing hearing, at which it made the following observations:

> As far as the sentence here, the Defendant's prior criminal history was all misdemeanors. He had no prior felonies. He did have one felony conviction that was subsequent to this offense down in Texas. The circumstances of the crime I don't think are outside what the legislature had in mind when they set the penalty for this offense. In other words, I didn't see anything in the probable cause [affidavit] that particularly aggravated the offense. It was certainly a serious offense. But, the legislature decided when you're dealing that much, you're dealing that much drugs [sic], it's a "C" felony. So, unless he does something extremely aggravated during the course of that offense, there isn't a basis in my mind to enhance it. His record, I don't believe warrants an enhancement, given the fact that his prior record was all misdemeanors.

Transcript at 21. Based on these observations, the trial court found there were no aggravating or mitigating circumstances and sentenced Mendoza to a presumptive term of four years to be served with the Indiana Department of Correction. Mendoza now appeals.

Discussion and Decision

I. Standard of Review

Indiana appellate courts have authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. It is the defendant's burden to "persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

II. Appropriateness of Sentence

The trial court sentenced Mendoza to four years executed for his Class C felony conviction of dealing in marijuana in an amount greater than ten pounds. Thus, Mendoza received the presumptive sentence.[3] See Ind. Code § 35-50-2-6(a) (2003) ("A person who commits a Class C felony shall be imprisoned for a fixed term of four (4) years, with not more than four (4) years added for aggravating circumstances or not more than two (2) years subtracted for mitigating circumstances.").

Mendoza does not argue that the nature of the offense renders his sentence inappropriate and, as noted above, the record does not shed light on the particulars of the offense. Mendoza does, however, argue that his sentence is inappropriate in light of his

[3] The current advisory sentencing scheme replaced the presumptive sentencing scheme on April 25, 2005. See Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Because Mendoza committed his offense prior to that date, the presumptive sentencing scheme applies in this case. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

character because he pled guilty, agreed to work as a confidential informant, was remorseful, and because "[t]he sentence handed down does not reflect the harm to [his] children . . . ."[4] Appellant's Brief at 10. Turning first to Mendoza's guilty plea, our supreme court has stated that "a defendant who pleads guilty deserves 'some' mitigating weight be given to the plea in return." Anglemyer v. State, 875 N.E.2d 218, 220 (Ind. 2007) (opinion on reh'g). However, the mitigating weight assigned to a guilty plea is relatively low if the circumstances indicate the defendant is not taking responsibility for his actions, if there is substantial admissible evidence of the defendant's guilt, or if "the defendant receives a substantial benefit in return for the plea." Id. at 221. Although the Class D felony possession charge was apparently a lesser included offense of the charge to which Mendoza pled guilty, the other Class D felony possession charge, which was predicated on a prior conviction involving marijuana, was not. That charge carried a sentence of six months to three years, see Ind. Code § 35-50-2-7(a) (2003), and in light of the fact that Mendoza faced a sentence of two to eight years for the charge to which he pled guilty, we cannot say that the dismissal of the D felony charge was insubstantial. As such, Mendoza's guilty plea does not provide much favorable commentary on his character.

Similarly, Mendoza's agreement to work as a confidential informant does not necessarily comment favorably on his character. That agreement was part and parcel of Mendoza's plea agreement, and because we have already determined that Mendoza

[4] Mendoza also advances several policy arguments to the effect that incarceration is not an effective means to vindicate the goals of the criminal law. Although we generally welcome novel arguments, the task before us is to determine whether Mendoza's sentence is inappropriate, not to pass judgment on the manner in which our legislature has decided to punish criminal offenders, and we therefore decline Mendoza's invitation to invalidate his sentence on such grounds.

received a substantial benefit from his guilty plea, our observations regarding the mitigating weight to assign to his plea apply equally to the mitigating weight to assign to his agreement to work as a confidential informant.

Turning to the remaining points in the record that Mendoza claims comment favorably on his character, we note that although a defendant's remorse is generally considered favorable, we hesitate to ascribe such remorse to Mendoza because some of his statements are more consistent with dissatisfaction over having been in prison than with remorse over the wrongfulness of his actions. See Tr. at 19 (Mendoza stating to the trial court, "I want to know if you can help me to get out, because I got family in Texas. I got two daughters waiting for me. And I got almost a year and a half in jail. I'm not from here. I don't want to do it again"). That the trial court did not find Mendoza's purported remorse to be a mitigating circumstance further indicates it does not provide much favorable commentary on his character. Cf. Pickens v. State, 767 N.E.2d 530, 535, 535 (Ind. 2002) (stating that a trial court's determination of whether a defendant's purported remorse is genuine is "similar to a determination of credibility" and will not be disturbed absent "impermissible considerations"); Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004) (recognizing that "substantial deference must be given to a trial court's evaluation of remorse" because the trial court "has the ability to directly observe the defendant and listen to the tenor of his or her voice . . . to determine whether the remorse is genuine"). Finally, regarding hardship to Mendoza's family, our supreme court has stated that "many persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that

imprisonment will result in an undue hardship." Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). Mendoza does not cite evidence in the record indicating special circumstances are present here, and our review discloses no such evidence either. In short, the record indicates there is nothing remarkable about the nature of the offense or Mendoza's character, which is reflected in the fact that he received the presumptive sentence.

The burden was on Mendoza to demonstrate that his sentence is inappropriate in light of the nature of the offense and his character. After due consideration of the trial court's sentencing decision and of the record, we are not convinced Mendoza has carried this burden. Thus, we conclude Mendoza's sentence is not inappropriate.

Conclusion

Mendoza's sentence is not inappropriate in light of the nature of the offense and his character.

Affirmed.

NAJAM, J., and MAY, J., concur.